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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WELLS FARGO BANK, N.A., Plaintiff, Cross-defendant and Appellant, v. ROBERT MCIVOR, Defendant, Cross-complainant and Respondent.	D073871 (Super. Ct. No. 37-2017-00015107-CL-CL-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E.L. Strauss, Judge. Reversed.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Plaintiff, Cross-defendant and Appellant.

Golden & Cardona-Loya and Jeremy S. Golden for Defendant, Cross-complainant and Respondent.

Wells Fargo Bank, N.A. sued Robert McIvor for a balance due on his credit card account. McIvor cross-complained, alleging Wells Fargo violated consumer statutes and

committed elder abuse. Wells Fargo moved for arbitration on the cross-complaint based on the parties' agreement requiring arbitration of all disputes except for collection actions. Over McIvor's opposition, the court granted Wells Fargo's motion, but stayed the arbitration pending the resolution of Wells Fargo's complaint in court.

Wells Fargo appeals, contending the Federal Arbitration Act (FAA) governs the parties' agreement and the arbitration stay violated the FAA. (9 U.S.C. § 1 et seq.) The argument is meritorious. The parties' contract reflects their agreement to apply FAA substantive *and* procedural rules, and FAA procedural rules do not permit a court to stay an action under the circumstances here. We thus reverse the order and direct the court to issue a new order granting Wells Fargo's motion to compel arbitration on McIvor's cross-complaint without staying the arbitration.

FACTUAL AND PROCEDURAL SUMMARY

In April 2017, Wells Fargo filed a collection action against McIvor seeking to recover McIvor's credit card debt. In his answer, McIvor denied Wells Fargo's allegations and asserted an identity-theft affirmative defense.

McIvor then cross-complained against Wells Fargo on the ground that some of the credit card charges allegedly resulted from identity theft. He claimed that when he discovered the erroneous charges, he disputed them with Wells Fargo, but the bank failed to conduct a reasonable investigation and instead continued collection efforts. McIvor asserted causes of action for violation of the Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.) and the Consumer Credit Reporting Agencies Act (Civ. Code, § 1785.1), and for elder abuse. McIvor said he is 85 years old and visually impaired.

Wells Fargo answered, and then moved to compel arbitration of the cross-complaint only. Wells Fargo submitted the declaration of a collections manager, who attached the parties' 20-page credit card contract. The contract contained a lengthy arbitration provision. The first paragraph states: "You and Wells Fargo Bank, N.A. (the 'Bank') agree that if a Dispute arises between you and the Bank, . . . the Dispute shall be resolved by [arbitration]," but "the Bank shall not initiate an arbitration to collect a consumer debt . . . ." The second paragraph contains rules governing the arbitration procedure, and states: "This Arbitration Agreement and any resulting arbitration are governed by the provisions of the Federal Arbitration Act . . . , and, to the extent any provision of that Act is inapplicable, unenforceable or invalid, the laws of the state of South Dakota."[1] The third paragraph identifies the parties' rights that are preserved in the agreement, and the fourth paragraph pertains to attorney fees recovery.

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1 This paragraph stated in full: "b. Arbitration Procedure: Severability. Either you or the Bank may submit a Dispute to binding arbitration at any time notwithstanding that a lawsuit or other proceeding has been previously commenced. NEITHER YOU NOR THE BANK SHALL BE ENTITLED TO JOIN OR CONSOLIDATE DISPUTES BY OR AGAINST OTHERS IN ANY ARBITRATION, OR TO INCLUDE IN ANY ARBITRATION ANY DISPUTE AS A REPRESENTATIVE OR MEMBER OF A CLASS, OR TO ACT IN ANY ARBITRATION IN THE INTEREST OF THE GENERAL PUBLIC OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. Each arbitration, including the selection of the arbitrator(s), shall be administered by the American Arbitration Association (AAA), or such other administrator as you and the Bank may mutually agree to (the AAA or such other mutually agreeable administrator to be referred to hereinafter as the "Arbitration Administrator"), according to the Commercial Arbitration Rules and the Supplemental Procedures for Consumer Related Disputes ("AAA Rules"). To the extent that there is any variance between the AAA Rules and this Arbitration Agreement, this Arbitration Agreement shall control. Arbitrator(s) must be members of the state bar where the arbitration is held, with expertise in the substantive laws applicable to the subject matter of the Dispute. No

McIvor opposed the motion, asserting collection actions are excluded under the first paragraph of the arbitration provision. McIvor alternatively argued that Wells Fargo waived its right to compel arbitration by filing its complaint in court and waiting several months before filing its motion.

Wells Fargo replied that it was not seeking to arbitrate its collection claim, and instead was seeking only to compel arbitration of McIvor's consumer and elder abuse claims alleged in his cross-complaint. Wells Fargo stated that McIvor has not challenged the authenticity or admissibility of the arbitration agreement, nor has he challenged that his consumer and elder abuse claims asserted in his cross-complaint fall within the scope of the mandatory arbitration requirement. Wells Fargo also maintained that it did not waive its right to compel arbitration, arguing the timing of its request was reasonable. In support, Wells Fargo noted that it moved to compel the arbitration less than three months after McIvor filed his cross-complaint; there has been no discovery or other litigation activity in the case; and there were no facts showing McIvor was prejudiced by any delay.

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arbitrator or other party to an arbitration proceeding may disclose the existence, content, or results thereof, except for disclosures of information by a party required in the ordinary course of its business or by applicable law or regulation. You and the Bank (the "Parties") agree that in this relationship: (1) The Parties are participating in transactions involving interstate commerce; and (2) This Arbitration Agreement and any resulting arbitration are governed by the provisions of the Federal Arbitration Act (Title 9 of the United States Code), and, to the extent any provision of that Act is inapplicable, unenforceable or invalid, the laws of the state of South Dakota. If any of the provisions of this Arbitration Agreement dealing with class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, that invalid provision shall not be severable and this entire Arbitration Agreement shall be unenforceable."

After reviewing the parties' submissions, the court requested McIvor to submit a supplemental brief "regarding the narrower issue of compelling arbitration of the cross-complaint only."

In his supplemental brief, McIvor argued the court should deny Wells Fargo's motion based on Code of Civil Procedure section 1281.2, which permits a court to deny a motion to arbitrate or to stay an arbitration if: (1) there would be a possibility of conflicting rulings based on a pending court action involving third parties not subject to arbitration; or (2) the arbitration could become unnecessary based on other claims or issues between the parties that are not subject to arbitration but are pending in a court action. (Code Civ. Proc., § 1281.2, subds. (c), (d).)[2] Relying on section 1281.2, subdivision (c), McIvor argued there is a "real risk of conflicting rulings" from the arbitration and court action because the facts underlying his defense and affirmative causes of action are identical.

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2 Under the relevant portions of these subdivisions, a court "shall" grant a motion to compel arbitration if there is an enforceable arbitration agreement "unless it determines that: [¶] . . . [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact . . . to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. . . . [¶] (d) . . . [¶] . . . [¶] If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action . . . between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies." (Code Civ. Proc., § 1281.2, subds. (a), (c), (d).) All further statutory references are to the Code of Civil Procedure.

In response, Wells Fargo argued section 1281.2, subdivision (c) was factually inapplicable because there would be no risk of inconsistent rulings as the collection action would resume only after resolution of McIvor's arbitration claims, and this subdivision pertained only when there are overlapping disputes with third parties. It also noted that if McIvor preferred one forum to resolve all of the disputes, the arbitration provision permitted him to agree to arbitrate Wells Fargo's collection claim.

After a hearing, the court granted Wells Fargo's motion to compel arbitration of the cross-complaint, finding McIvor's claims concern a "dispute . . . within the scope of the arbitration agreement and thus, subject to arbitration." The court also rejected McIvor's argument that Wells Fargo waived its right to compel arbitration. But the court said that "to avoid conflicting rulings, the arbitration is stayed pending adjudication of the issues in the complaint (i.e. the non-arbit[r]able issues), including any and all affirmative defenses," citing *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2015) 234 Cal.App.4th 459 (*Los Angeles*). The court denied Wells Fargo's attorney fees request.

On appeal, Wells Fargo challenges only the stay portion of the arbitration order.

DISCUSSION

In ruling on a motion to compel arbitration, "the [trial] court *shall* order [the parties] to arbitrate . . . if it determines that an agreement to arbitrate the controversy exists . . . ." (§ 1281.2, italics added.) " '[T]he party seeking arbitration bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence, and the party opposing arbitration bears the burden of proving by a preponderance of the

evidence any defense . . . .' " (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1106.) Where, as here, there are no disputed facts, we review the court's rulings de novo. (*Ibid.*) We also apply a de novo review standard in determining the applicability of the state and federal arbitration statutes. (*Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1262-1263 (*Mastick*).)

The trial court stayed the arbitration proceeding based on the exceptions set forth in section 1281.2. (See § 1281.2, subds. (c), (d).) Wells Fargo contends the court erred because the agreement is governed by the FAA, and under the FAA, a court has no authority to stay an arbitration under section 1281.2.

Before reaching this issue, we note there is some question whether the exceptions in section 1281.2 apply to the factual circumstances here. (§ 1281.2, subds. (c), (d).) Section 1281.2, subdivision (c) sets forth an exception when "[a] party to the . . . agreement is also a party to a pending court action . . . with a third party . . . ." (See fn. 2, *ante*.) There were no third parties involved in McIvor's dispute with Wells Fargo. Section 1281.2, subdivision (d) permits a court to delay an arbitration order if there are "other issues" between the parties that "are not subject to arbitration" and a determination on those issues in a pending action "may make the arbitration unnecessary." (See fn. 2, *ante*.) Although McIvor's affirmative defenses to the complaint and the claims alleged in his cross-complaint involved identity-theft claims, a court's ruling on this affirmative defense to the collection claim would not generally "make the arbitration unnecessary." (§ 1281.2, subd. (d).) For example, even if the court found identity theft was a valid defense in the collection action, the arbitrator would still need to determine whether there

was a basis for an affirmative recovery under the applicable consumer statutes *and* the existence and amount of any damage recovery.

But even assuming the court acted within its discretion to find these exceptions applicable to support the stay, the court did not consider the predicate issue whether California or federal law applies.[3] If the FAA applies, the court did not have the authority to stay the arbitration under these circumstances. The FAA does not authorize courts to stay arbitration pending resolution of litigation or to refuse to enforce a valid arbitration provision to avoid duplicative proceedings or conflicting rulings. (*Dean Witter Reynolds Inc. v. Byrd* (1985) 470 U.S. 213, 216-221; *Mastick, supra,* 209 Cal.App.4th at p. 1263.) Unlike California law, the FAA "*requires* piecemeal resolution [of a dispute] when necessary to give effect to an arbitration agreement." (*Moses H. Cone Memorial Hospital v. Mercury Construction Corp*. (1983) 460 U.S. 1, 20, fn. omitted.)[4]

In analyzing the issue of whether federal or state law applies to the arbitration stay issue, the general rule is that section 1281.2 stay provisions are considered procedural

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3 The court's failure to consider this foundational issue is understandable as Wells Fargo did not assert this specific issue in response to McIvor's reliance on section 1281.2's exceptions. However, the issue is a legal question not dependent on a resolution of factual disputes. Therefore the contention is properly before us. But we reject Wells Fargo's contention that McIvor forfeited *his* right to challenge the applicability of FAA procedural rules in this case.

4 We reject McIvor's suggestion that courts retain powers to stay arbitrations under the FAA. This argument is contrary to settled law. (See *Dean Witter Reynolds, supra,* 470 U.S. at pp. 216-221.) McIvor's cited authorities do not show this law is no longer viable.

rules that apply to motions to compel arbitration brought in California courts, even if the arbitration contract involves interstate commerce governed by FAA substantive provisions. (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 388-393 (*Cronus*); see *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468, 476; *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840-841; *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 631-632 (*Judge*).)

This principle, however, is subject to the parties' contrary agreement. (*Cronus*, 35 Cal.4th at p. 394.) If parties agree that FAA procedural law applies to the arbitration agreement, then the exceptions to section 1281.2's mandatory arbitration requirement are not a proper basis for a California court to stay an arbitration proceeding. (*Cronus*, at p. 394; see *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1122 (*Rodriguez*); see also *Williams v. Atria Las Posas* (2018) 24 Cal.App.5th 1048, 1053-1054.)

We thus must consider the parties' agreement. The parties' credit card contract states the agreement "is governed by federal law, and to the extent applicable, the laws of the State of South Dakota, no matter where you live or use your Account." By itself, this choice of law provision applicable to the entire credit card contract was not necessarily sufficient to bar the court from relying on the section 1281.2 exceptions to stay an arbitration. California procedural rules are the default rules, and apply unless the parties expressly designate that different *procedural* provisions shall apply. (*Cronus, supra*, 35 Cal.4th at pp. 389-390, 394; see *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th

899, 922 (*Sanchez*); *Avila, supra,* 20 Cal.App.5th at pp 840-841; *Judge, supra,* 232 Cal.App.4th at p. 631.)

But the parties' agreement contained an additional expression of their intent pertaining to the governing law. The contract's arbitration provision (entitled "Dispute Resolution Program: Arbitration Agreement") contains four parts: "a. Binding Arbitration"; "*b. Arbitration Procedure: Severability*"; "c. Rights Preserved"; and "d[.] Fees and Expenses of Arbitration." (Italics added.) The second part titled "Arbitration Procedure: Severability" contains language again identifying the FAA as the controlling law: "This Arbitration Agreement and any resulting arbitration are governed by the provisions of the Federal Arbitration Act . . . , and, to the extent any provision of that Act is inapplicable, unenforceable or invalid, the laws of the state of South Dakota." (See fn. 1, *ante*.)

Viewing the credit card contract, and specifically the language and format of the arbitration provision, the only reasonable interpretation is that the parties agreed FAA procedural rules would govern. Because the designation of the FAA was contained in the section entitled "Arbitration Procedure: Severability," the parties must have intended that the FAA *procedural* provisions—and not California procedures—would apply in resolving arbitration agreement enforcement issues.[5] Those issues include whether a

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[5] We note that South Dakota law was identified as the alternate law if federal law is inapplicable, unenforceable, or invalid. As with federal law, South Dakota law does not permit a court to stay an action based on the risk of inconsistent determinations in different forums arising out of the same facts. (See *City of Hot Springs v. Gunderson's, Inc.* (S.D. 1982) 322 N.W. 2d 8, 10-11.)

court can properly decline to enforce an arbitration agreement under section 1281.2 because of the possibility that litigation of nonarbitrable issues would make the arbitration unnecessary. (See *Cronus, supra,* 35 Cal.4th at pp. 386-390.) Because the FAA procedural rules apply, the court erred in staying arbitration of McIvor's claims against Wells Fargo. (See *Mastick, supra,* 209 Cal.App.4th at p. 1263; *Rodriguez, supra,* 136 Cal.App.4th at p. 1122.)

The trial court's reliance on *Los Angeles, supra,* 234 Cal.App.4th 459 was misplaced because the *Los Angeles* court did not consider the FAA preemption issue. This case is also different from *Los Angeles Unified School Dist. v. Safety National Casualty Corp.* (2017) 13 Cal.App.5th 471. In that case, the arbitration agreement did not contain *any* reference to the FAA or to a choice of law. (*Id.* at p. 479.) The defendant nonetheless argued that the FAA procedures applied because the contract involved interstate commerce. (*Id.* at pp. 477, 478.) The Court of Appeal disagreed, explaining that California procedural rules are the default rules, and apply unless the parties expressly designate that the FAA procedural provisions shall apply. (*Id.* at p. 482; see *Cronus, supra,* 35 Cal.4th at p. 394*; Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 173-174; see also *Sanchez, supra,* 61 Cal.4th at p. 922.) McIvor's case falls within the express-agreement exception because the parties agreed in their arbitration agreement that federal law governs the entire credit card contract *and* the FAA governs the procedural aspects pertaining to enforcement of the arbitration provision.

McIvor's additional contentions are without merit. First, McIvor argues the trial court acted within its discretion in deciding that the complaint and cross-complaint were overlapping or could produce inconsistent outcomes under section 1281.2. (See § 1281.2, subds. (c), (d).) Even if we were to agree with this factual assertion, it does not resolve the question here. The issue before us is whether the court had the statutory authority to stay the action under section 1281.2. This requires that we determine whether the parties agreed that federal procedural law—and not state law—would govern. Because we have determined that the parties agreed FAA procedural law applies, section 1281.2's exceptions have no relevance.

McIvor also contends Wells Fargo waived its right to compel arbitration by filing its collection action in court and/or waiting too long to bring the motion to compel. The court ruled against McIvor on these issues, and McIvor did not file a cross-appeal. He is thus precluded from raising it now. In any event, we are satisfied the court did not abuse its discretion in finding Wells Fargo did not waive its arbitration rights on the claims raised in the cross-complaint. The record supports a factual conclusion that Wells Fargo did not unreasonably delay in seeking arbitration after McIvor filed his cross-complaint and/or that McIvor did not suffer any prejudice from any such delay.

DISPOSITION

We reverse the March 9, 2018 order and direct the court to issue a new order granting Wells Fargo's motion to compel arbitration on McIvor's cross-complaint without staying the arbitration. The parties are to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.